UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEEDHAM EXCAVATING, INC.
Employer

and

Case 25-RD-195949

JAKE MADDEN
Petitioner

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO
Union

ORDER

The Union's Request for Review of the Regional Director's Decision and Direction of Elections is denied as it raises no substantial issues warranting review.[1] We find that the Regional Director did not err when she permitted the Petitioner to amend and clarify the original petition, and directed an election in the Heavy Highway unit (in addition to the Building unit) because of her finding that two distinct units existed. First, as the Regional Director correctly noted, the Petitioner has consistently sought an election for *all* machine operators, albeit in a single bargaining unit.[2] Moreover, it was reasonable for the Petitioner to attempt to clarify the description of the bargaining unit given the uncertainty created by the Employer's operations and conduct under the Building and Heavy Highway Agreements.[3] Under the circumstances of this case, the Regional Director recognized that it would be unrealistic to expect an employee to

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[1] The Union's request for oral argument is also denied.
[2] We agree with the Regional Director that the original petition contemplated all machine operators of the Employer who perform building or excavation work, which would include work under the Quad Cities Building and Heavy Highway Agreements. Furthermore, neither the Building Agreement nor the Heavy Highway Agreement was specifically referenced in the petition. For these reasons, we reject the assertion by the Union and our dissenting colleague that the Petitioner's intent was to limit the scope of the original petition to the Employer's employees working under the Building Agreement.
[3] The Building Agreement reflects a longstanding contractual relationship that has been in place for approximately 14 years, while the Heavy Highway Agreement is new and has only been in place since January 1, 2016. Further confusing the status of the employees' work is the fact that the Employer made all of the employees' benefit fund payments pursuant to the Building Agreement, irrespective of whether the work had been completed under that agreement. Accordingly, there is merit to the Petitioner's argument that at the time of the original filing, the employees were likely unaware of the existence of two different agreements.

grasp the distinctions between two very similar bargaining units, especially given their overlap of employees and their shared terms and conditions of employment. Thus, we disagree with our colleague's contention that the Petitioner impermissibly attempted to add a separate bargaining unit to the original petition.

We further agree with the Regional Director that the petition, as amended, was timely. Under the Board's well-established *Deluxe Metal Furniture* standard, the filing date of the original petition controls when "the employers and the operations or employees involved were contemplated by or identified with reasonable accuracy in the original petition, or the amendment does not substantially enlarge the character or size of the unit or the number of employees covered." 121 NLRB 995, 1000 fn. 12 (1958). Here, the original petition comprised the same employer, union, and employees[4] and sought an election among all of the Employer's machine operators. Additionally, as the Regional Director noted, the amendment did not substantially expand the unit or change its character, because the same universe of machine operating employees was contemplated. Furthermore, given the units' similarities, the petition would reasonably have put the Employer and Union on notice that the Petitioner might be seeking to challenge the Union's status in both units. Accordingly, under *Deluxe Metal Furniture*, the timely filing of the original petition controls. [5]

Last, we observe that the Regional Director's decision to afford the employees in both units an opportunity to express their desire for continued representation by the Union is consistent with the Board's longstanding policy promoting and protecting employee choice.

MARVIN E. KAPLAN, CHAIRMAN

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., January 19, 2018

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[4] The original petition indicated that there were eight employees in the bargaining unit. Furthermore, the record supports the finding that five out of the eight employees perform work under and regularly move back and forth between work under both agreements.

[5] We necessarily disagree, then, with our dissenting colleague's view that the amendment amounted to the filing of a new petition and thus that the amendment's filing date (not the filing date of the original petition) applies in determining whether the contract bar is implicated.

MEMBER PEARCE, dissenting.

It is well settled that under the contract bar doctrine, election petitions will be dismissed as untimely when filed within the 60-day "insulated" period prior to the expiration date of the collective-bargaining agreement covering the petitioned-for employees. *Deluxe Metal Furniture*, 121 NLRB 995, 1000 (1958). The purpose of this rule is to "further industrial peace and stability by assuring that the labor relations environment will not be disrupted during the term of a collective-bargaining agreement." *Crompton Co.,* 260 NLRB 417, 418 (1982). Despite this established precedent, the Regional Director granted the Petitioner's motion to amend its petition *during the insulated period* to add a second distinct bargaining unit, covered by a separate collective-bargaining agreement. This was clear error under *Deluxe Metal*. Accordingly, and contrary to my colleagues, I would grant the Union's Request for Review of the Regional Director's Decision and Direction of Elections.

Factually this is a straightforward case. From 1992 until January 1, 2016, the Employer and the Union were parties to successive collective-bargaining agreements known as the Quad Cities Building Agreement. By their terms, these Quad Cities Building agreements covered employees "engaged in the operation and maintenance of all hoisting and portable machines and engines used on *building work and excavating work* …" (Emphasis added.) On January 1, 2016, the parties executed a new, successor Quad Cities Building Agreement. On the same day, the parties entered into a separate Heavy Highway Agreement which covered employees engaged in different work, specifically those "engaged in the operation and maintenance of all hoisting and portable machines and engines used in *all open and heavy construction work* …" (Emphasis added.) Both contracts were in effect from January 1, 2016 to May 31, 2017.[1]

On March 31, the day before the 60-day insulated period commenced for both agreements, the Petitioner filed the instant petition for an election in the unit of "Machine operators for building and excavation," i.e. the Building Agreement unit. The petition made no reference to the Heavy Highway Agreement, or to the unit described in that agreement. However, on April 10, after the window period for filing a petition had closed, the Petitioner moved to amend the petition.[2] The Regional Director rejected the Petitioner's contention that machine operators covered by the separate collective-bargaining agreements constitute a single bargaining unit and agreed with the Union that there were two separate appropriate bargaining units and two separate collective-bargaining agreements. Nevertheless, the Regional Director granted the Petitioner's motion, finding that the Petitioner's amendment to add the separate Heavy Highway Agreement unit, after the window period had closed, was a clarification of the petitioned-for unit. Acknowledging, however, that a single election would not be appropriate for the two distinct units, the Regional Director ordered separate elections for the two units. The Regional Director explained that because it was her ruling rather than the amendment that clarified the existence of two separate units, the timing of the amendment did not create a bar to an election in the second unit.

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[1] All dates hereafter refer to 2017.

[2] My colleagues contend that the timely-filed petition sought an election among all of the Employer's machine operators. The petition, however, did not reference "all" machine operators; instead, it identified only those machine operators "for building and excavation."

Contrary to my colleagues, I find that the Regional Director clearly erred when accepting an untimely amendment to the petition and directing an election in the Heavy Highway unit.

First, the timely-filed petition unambiguously identified the unit as "Machine operators for building and excavation" – corresponding to the unit described in the Building Agreement's recognition clause: employees performing "building work and excavating work." Indeed, it is undisputed that the Building Agreement makes no reference to employees performing "open and heavy construction work." That is the unit described in the Heavy Highway Agreement's recognition clause. It was not until the Petitioner's April 10 motion that the Heavy Highway Agreement was first referenced, well after the window period had closed.[3]

Second, the Petitioner's amendment to add a separate bargaining unit "in effect constituted the making of a new claim and the filing of a new petition." *Dunbar Glass Corp*, 77 NLRB 742, 743 (1948) (amendment untimely sought to add skilled glassworkers to unit of miscellaneous glassworkers). Under well-established precedent, the Board in such situations applies the *amendment's* filing date and not the date of the original petition in determining whether a contract is in effect that bars an election. Id.; see also *Hyster Co.*, 72 NLRB 937 (1947) (amendment seeking election in production and maintenance unit did not relate back to timely-filed petition seeking election in craft unit). By accepting the amendment, the Regional Director acted not only contrary to law but flatly contradicted her own determination that there are two separate collective bargaining agreements and two separate units, warranting separate elections for each of the two units. Her conclusion that the motion "sought to clarify the description of the bargaining unit rather than to add an additional unit" is clear error.

Finally, the Regional Director and the majority's reliance on the fact that certain individuals performed work under both the Building Agreement and the Heavy Highway Agreement, as support for her acceptance of the late amendment, is misplaced. It ignores the critical fact that the amendment combines the petitioned-for unit with a clearly identified separate unit. And their reliance on the personal identities of employees in this instance runs contrary to the well-settled rule that "a petitioned-for unit in a decertification petition must be coextensive with the certified or recognized unit." *Mo's West*, 283 NLRB 130, 130 (1987), citing *Campbell Soup Co.*, 111 NLRB 234 (1955).[4]

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[3] The majority claims, in essence, that it is irrelevant that the timely-filed petition referenced only one unit, because it is "unrealistic to expect an employee to grasp the distinction between the two units." The fact that the unit described in the timely-filed petition very clearly and distinctly referenced the unit described in the Building Agreement and included no language corresponding to the unit description in the Heavy Highway Agreement, demonstrates otherwise. Further, the majority's reliance on the fact that neither the Building Agreement nor the Heavy Highway Agreement was specifically referenced in the timely-filed petition is unavailing, because the unit description in that petition very clearly corresponded only to the unit described in the Building Agreement.

[4] The majority contends that under *Deluxe Metal Furniture*, supra at 1000 fn. 12, the second unit here can be added to the timely-filed petition simply because it implicates the same employer, union and employees. Contrary to their contention, *Deluxe Metal Furniture* does not include any

In sum, because the separate Heavy Highway Agreement unit was never referenced in the timely-filed petition, and the motion to include that separate unit was filed during the insulated period, the Regional Director should have denied the motion as untimely. Accordingly, I would grant the Union's request for review and remand the case to the Regional Director for further proceedings consistent with this opinion.

MARK GASTON PEARCE, MEMBER

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language that would permit the untimely addition of a separate unit that, as here, is defined by distinctly different work.